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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 988

MARVIN LUSTIGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1967 (Pet. App. A). On December 9, 1967, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari until January 5, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction of mail fraud.

2. Whether the trial court erred in excluding evidence tendered by petitioner on the issue of his good faith.

3. Whether the mail fraud statute, as applied, violated petitioner's right of free speech.

STATEMENT

Following a trial without a jury in the United States District Court for the District of Arizona, petitioner was convicted on counts 1–8 and 11–19 of a 19-count indictment charging that he used the mails in furtherance of a scheme to defraud, in violation of 18 U.S.C. 1341 (1 R. 2–22; 4 R. 621).[1] The scheme, which was alleged to have been devised some time prior to September 7, 1960, and to have continued to October 25, 1963, the date of the return of the indictment, involved mail order sales of lots in a real estate development known as "Lake Mead City", in Mohave County, Arizona (1 R. 2, 331). Each count charged a separate mailing in execution of the scheme, the details of which were set forth in count 1 and repeated by reference in the remaining counts. On June 28, 1965, petitioner was sentenced to pay a fine of $1,000 on each of counts 1–8 and 11–18—a total of $16,000. The imposition of sentence on count 19 was suspended for six months on condition that the fines be paid within 90 days (1 R. 232). The court of appeals affirmed (Pet. App. A, B).

Since petitioner continues to challenge the suffi-

[1] Counts 9 and 10 were dismissed on motion of the government at the conclusion of the government's case (3 R. 416).

ciency of the evidence, the testimony and exhibits must be recounted in some detail: [2]

On September 7, 1960, petitioner organized the Lake Mead Land and Water Company ("the company"), an Arizona corporation all of whose stock was owned by petitioner and his family, and for whose management and policies petitioner alone was responsible. The company acquired ownership of, or options to buy, land in Mohave County, approximately 60 miles from Kingman, Arizona. The tracts consisted of the odd-numbered sections in a checkerboard pattern; the even-numbered sections were owned by the federal government. After subdividing the tracts, the company offered to sell some of the parcels to the public. The company called the area in which the lots were located "Lake Mead City"—after a lake of that name in the vicinity (3 R. 359, 361, 370, 393; Pet. App. B. 2).

Persons responding to the nationwide advertising campaign were sent an "Investor's Kit", consisting of a 32-page color brochure, a "Fact Sheet", and a land reservation form. Land which had cost petitioner from $33.20 to $125 an acre ($40 on the average) was sold in this way at prices ranging from $395 to $495 per 1¼-acre parcel. In a part of the project described as the "building area" the price was $695 for lots of this size. Sales continued until May 1962, when the advertising program was discontinued as the result of litigation over the company's title to the land. By March 10, 1962, three thousand lots had been sold (3 R. 361–

[2] The evidence is set forth in greater detail in the opinion below (Pet. App. B. 2–9).

363, 366–369; Pet. App. B. 2–3, 4). To provide its customers with a "gilt-edge" to their investment, the company offered a refund to any buyer who changed his mind or was not satisfied with his purchase, if he applied for a refund within 30 days (Pet. App. B. 3).[3]

Although correspondence was to be addressed to a designated post office box number in Phoenix, Arizona, the company in fact had only a part-time employee in that city. Petitioner processed the mail in Azusa, California, and then had the answers transported by bus to Phoenix, to be posted there by the employee. All checks were deposited in a Phoenix bank (2 R. 79–82; 3 R. 359, 362, 374; Pet. App. B. 2).

The advertising brochure which each prospective customer received contained numerous statements describing the asserted advantages of Lake Mead City. The development was described as "an enchanted city in the making" and Arizona's "best located planned community". While the brochure represented that all parcels had been platted and recorded, "with road easements laid out to assure you of access", most of the subdivision units were inaccessible by ordinary passenger automobiles, and except in the "building area" (located in one of the units) there were no streets, street signs, lot stakes, or lot identification markers. The "Fact Sheet" which accompanied the brochure did warn that no streets were presently available, but

[3] In addition, on April 29, 1963—more than five months after petitioner became aware that his activities were under investigation—the company offered to make a refund to any customer who expressed dissatisfaction with his purchase after visiting the site, provided he did so prior to September 1 of that year (Pet. App. B. 3, n. 2).

prospective customers were not told that the terrain in many of the units made actual construction of roads physically impracticable or unreasonably expensive. Nor was there mention that, except in the building area, no street or lot markers existed to enable a purchaser to determine the location of his lot or the boundaries of his road easement (1 R. 7, 10; 3 R. 364–365, 376-377; Pet. App. B. 7, 8).

One of the categories of allegedly deceptive and misleading statements contained in the advertising materials related to the availability of water, both for recreational and domestic uses. The brochure contained numerous photographs depicting water scenes on and around Lake Mead. The lake was said to be only five miles from Lake Mead City. Other photographs showed small lakes and ponds, purportedly located within the boundaries of Lake Mead City. One body of water was described as the "favorite swimming hole". A picture of a large metal water tank was accompanied by the printed assurance: "IMPORTANT! Plenty of Water" (1 R. 9, 10, 11; Pet. App. B. 5).

Although Lake Mead was within five miles of the nearest boundary of Lake Mead City if measured by a straight line, by existing roads the lake was 15 miles from the nearest and 40 miles from the farthest Lake Mead City unit (3 R. 393). Moreover, as noted above, most of the units were inaccessible by ordinary motor vehicles. While some of the water scenes depicted were within the outer boundaries of Lake Mead City, none of the pictured bodies of water was on land owned or optioned by petitioner's company. The photographs were taken on a ranch in which the

company had no interest, situated near the center of the area in which Lake Mead City was located. The body of water described as the "favorite swimming hole" was in fact a dirt tank for stock water, with two feet of mud on its bottom (3 R. 270–271; Pet. App. B. 6–7).

The vicinity map depicted several sources of water for the domestic use of lot purchasers; actually, the only source of water available for this purpose that was on property owned by the company was the Clearwater Well, located in the far northwest corner of the development, a distance of 28 miles from some subdivision units (3 R. 365–366, 394; Pet. App. B. 7).[4] In order to obtain water for domestic use, lot purchasers would be required to haul it from this well (or from Kingman, 60 miles away) and store it on their individual lots—or else dig their own wells (3 R. 366; Pet. App. B. 7).

The brochure stated that all Lake Mead City properties were "within the franchised area of Citizen's Utilities Company, with regard to power and tele-

[4] Without supporting citations to the record, petitioner says that the court of appeals was inaccurate in making this point. (Pet. 7–8; Pet. App. B. 7). He states that the company owned rights in the King Tut Water Pipeline and other wells and springs (Pet. 7–8). The court's statement is based on petitioner's own acknowledgment to a postal inspector in an interview held on November 10, 1962, after the investigation of his activities had begun (3 R. 358, 365–366). Petitioner specifically denied at that time that his company had an interest in the King Tut Pipeline. He said that the Clearwater Well (in which his company had a half interest) "was the only source of water Lake Mead City controlled and made available to their people" (3 R. 366).

phone". While this statement was literally true, and although the "Fact Sheet" acknowledged that utilities were not presently available, petitioner did not disclose that the nearest existing power and telephone lines were 23 miles from the nearest and 38 miles from the farthest Lake Mead City subdivision units. The company would not pay the cost of bringing power or telephone lines to any units of the development (1 R. 9; 3 R. 393; Pet. App. B. 7–8). The brochure also pointed out the "Modern schools, churches and shopping facilities in nearby Kingman * * *" (Pet. 19), although not until the second edition of the "Fact Sheet" did petitioner even mention that Lake Mead City is at least 60 miles from Kingman.

Notwithstanding the brochure's description of Lake Mead City as Arizona's best located "planned community", no community of residents or building improvements of any kind were in existence up to March 1963—seven months prior to the return of the indictment and five months after petitioner had become aware that his activities were under investigation—except for a small field office used by the company and a temporary dwelling occupied by a guide and caretaker. By the time of the trial, five houses were in various stages of completion (Pet. App. B. 8).

ARGUMENT

1. The district judge, as trier of the facts, found petitioner guilty. A unanimous court of appeals, on the basis of its careful review, found the evidence "overwhelming" that petitioner's advertising materials "were in some respects false and, apart from falsity were, when considered as a whole, fraudulently

deceptive and misleading, exhibiting an intent and purpose to defraud" (Pet. App. B. 9). Petitioner has suggested no reason why this Court should be called upon to provide further review of the sufficiency of the evidence. In any event, his contention that the evidence was insufficient (Pet. 10–31) is devoid of merit.

The indictment charged that petitioner's advertising materials contained numerous misleading, deceptive, false and fraudulent representations concerning the land offered for sale (1 R. 6–12).[5] In addition it charged that petitioner willfully concealed material facts from the persons intended to be defrauded (1 R. 12–14).[6] As the court of appeals pointed out (Pet. App. B. 5), petitioner did not ask the trial court to find the facts specially, as he might have done under Rule 23(c) of the Federal Rules of Criminal Proce-

[5] The alleged misrepresentations involved such matters as the land's investment potential, its status as a "planned community", its character as a "resort area", its proximity to water sports, the availability of power and telephone facilities, the adequacy of a domestic water supply, and the existence of houses in the development.

[6] The matters allegedly concealed included such facts as that all units of the development were located in odd-numbered sections, widely scattered in five different townships; that the alternate (even-numbered) sections, owned by the federal government, were used for grazing; that many units had rocky hills and unbridged natural drainage washes; that only a few of the units were adjacent to existing county-maintained roads and many were not accessible at all by ordinary motor vehicles; that the nearest available power and telephone lines were between 23 and 38 miles away; that most units did not have street signs or lot identification markers; and that some units were many miles from a domestic water supply.

dure,[7] and no special findings were entered. It follows that, as the court below noted (Pet. App. B. 5), the trial court must be presumed to have found in favor of the government with respect to each alleged misstatement and concealment relied on. This being so,[8] petitioner cannot prevail on his argument that some of the statements may have involved only "puffing", or that some of the representations and concealments were not material or were not shown to be false or deceptive. As long as the number of the statements shown to be knowingly false, deceptive, or misleading was sufficient to permit the inference that petitioner intentionally engaged in a scheme to defraud, the conviction was proper.[9] *Ballard* v. *United States*, 138 F. 2d 540, 545 (C.A. 9), reversed on other grounds, 322 U.S. 78; *Holmes* v. *United States*, 134 F. 2d 125, 133 (C.A. 8), certiorari denied, 319 U.S. 776; *Graham* v. *United States*, 120 F. 2d 543, 546 (C.A. 10); *Baker* v. *United States*, 115 F. 2d 533, 542 (C.A. 8), certiorari denied, 312 U.S. 692.

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[7] Rule 23(c) provides that "[i]n a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially." Petitioner expressly waived his right under this Rule to request special findings (1 R. 231).

[8] It was stipulated that petitioner had disseminated his advertisements through the mails.

[9] It is well settled, moreover, that if a scheme to defraud is devised, the fact that there may be no actual misrepresentation of an existing fact is immaterial. *Durland* v. *United States*, 161 U.S. 306, 312–314. It is only necessary to prove that the scheme was one reasonably calculated to deceive and that the mails were used and intended to be used in its execution. *Irwin* v. *United States*, 338 F. 2d 770, 773 (C.A. 9), certiorari denied, 381 U.S. 911; *Lemon* v. *United States*, 278 F. 2d 369, 373 (C.A.

Notwithstanding petitioner's assertions (Pet. 28–30), it was immaterial whether the lots were possibly worth what was paid for them. The statute, 18 U.S.C. 1341, makes it a crime to use the mails in executing a scheme to obtain money or property by false pretenses. It is not an essential element of the offense that the intended victims be actually defrauded or that they should appear to have suffered pecuniary loss. *United States* v. *New South Farm,* 241 U.S. 64; *United States* v. *Hoffa,* 367 F. 2d 698, 707 (C.A. 7), vacated on other grounds, 387 U.S. 231; *Adjmi* v. *United States,* 346 F. 2d 654, 657–658 (C.A. 5), certiorari denied, 382 U.S. 823; *United States* v. *Sylvanus,* 192 F. 2d 96, 106 (C.A. 7), certiorari denied, 342 U.S. 943; *Blue* v. *United States,* 138 F. 2d 351, 359 (C.A. 6), certiorari denied, 322 U.S. 736; *Hass* v. *United States,* 93 F. 2d 427, 432 (C.A. 8); *Cowl* v. *United States,* 35 F. 2d 794, 797 (C.A. 8); *Wine* v. *United States,* 260 Fed. 911, 914 (C.A. 8), certiorari denied, 253 U.S. 484.[10] Nor was it a defense to the

9); *Gregory* v. *United States,* 253 F. 2d 104, 109 (C.A. 5); *Kreuter* v. *United States,* 218 F. 2d 532, 535 (C.A. 5), certiorari denied, 349 U.S. 932.

[10] In *Miller* v. *United States,* 174 Fed. 35 (C.A. 7), cited at Pet. 15–16, 30, the Seventh Circuit held that use of the mails to induce stock purchases, through false and deceitful representations, did not violate the mail fraud statute unless the stock was shown to have had a monetary value less than was paid for it. However, that case arose under the old mail fraud statute (Rev. Stat. § 5480), prior to its amendment in 1909 to embrace schemes to obtain money or property by false pretenses as well as simple schemes "to defraud" (Criminal Code of 1909, § 215, 35 Stat. 1130). Even apart from this distinction, the decision would be irreconcilable with this Court's later decision in *United States* v. *New South Farm, supra,* 241 U.S. 64, and with the Seventh Circuit's own more recent decisions. See *United States* v. *Hoffa, supra,* 367 F. 2d at 707. Petitioner's contention that the

charges, as petitioner argues (Pet. 30), that the company maintained a refund policy, under which a dissatisfied customer could get his money back. While such a policy may be evidence of good faith, it does not necessarily negate a finding of bad faith. See *United States* v. *Sylvanus, supra,* 192 F. 2d at 105. Here the refund offer was limited to 30 days—scarcely time enough to enable many purchasers (particularly those who lived far away, as most did) to make an informed decision in the matter. Moreover, as the court of appeals observed (Pet. App. B. 10), and as the evidence here reflected, disgruntled purchasers are not likely to attempt to take advantage of refund offers; once the fraudulent character of the original transaction has become apparent, the disillusioned purchaser will often not think it worth the effort to press for a refund. This question is appropriately for the trier of fact.

2. Petitioner's claim that relevant evidence was improperly excluded (Pet. 31–44) is also untenable.

a. The trial court excluded proffered exhibits relating to the activities of other private Arizona land developers and similar materials relating to small-tract offerings by the Federal Bureau of Land Management. The rejected exhibits of the private offers con-

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circuits are in conflict on this issue (Pet. 28–29) is based on a *dictum* in *United States* v. *Baren*, 305 F. 2d 527, 528 (C.A. 2), which is repeated in *United States* v. *Rabinowitz*, 327 F. 2d 62, 76 (C.A. 6) (also by way of *dictum*), to the effect that "In every mail fraud case, there must be a scheme to defraud, representations known by defendants to be false and some person or persons must have been defrauded." As we have noted in the text, however, the holdings both of this Court and of the lower courts are clear that proof of financial loss by intended victims of the scheme is unnecessary.

sisted of compendia of advertisements and promotional materials used by other Mohave County real estate subdividers, competitors of petitioner, during the period involved. Petitioner contends that the excluded materials were relevant to the issue of his good faith in that they showed, for example, that although the competing subdivisions had the same checkerboard pattern as did petitioner's, his competitors also had refrained from disclosing this in their advertising; that the competitors had outdone petitioner in the imaginative use of names for their projects; that they had been more flamboyant in the claims made about their properties; etc. (Pet. 34–37). The admission or exclusion of evidence of this general character, for the purposes described, rested within the sound discretion of the court. Cf. *Hofmann* v. *United States*, 353 F. 2d 188, 191 (C.A. 10); *Grell* v. *United States*, 112 F. 2d 861, 875–876 (C.A. 8). If the tendered evidence had been received, as the court of appeals aptly noted (Pet. App. B. 13–14), the government would have been entitled to litigate the deceptive character of the third-party advertising materials. It was reasonable to avoid such collateral inquiries, which would have had the effect of diverting the proceedings into four or five other mail fraud cases. Similarly, with respect to the offerings of the Federal Bureau of Land Management, the government would have been entitled to show that statements in the Bureau's circulars, pointed to by the defense as establishing standards of advertising to which petitioner had in good faith adhered, were so totally unlike the statements of petitioner charged to

be fraudulent that no basis existed for the claim of good-faith reliance. Avoidance of the need for such tangential inquiries was within the court's sound discretion.

b. The court also refused to admit the opinion testimony of a former president of the Arizona League of Land Developers to the effect that petitioner's advertising materials and sales techniques during the relevant period "were well within the range of advertising representations and materials, sales techniques and devices generally and customarily deemed proper during that period, and generally and customarily used during that period by land subdividers who then were and now are considered entirely proper and ethical by the industry itself and the public as a whole" (Pet. 44). As the court of appeals pointed out, however (Pet. App. B. 14), the advertising customs among the land subdividers of the area were immaterial—as were the views of the subdividers as to the ethics of the existing practices. The statutory test was whether there had been a scheme to defraud, and evidence of the practice of the industry would have had no bearing on that inquiry. Moreover, insofar as the rejected testimony sought to give the view of the witness as to the ethics of petitioner's conduct, it was tantamount to an expression of opinion on the ultimate fact in issue—the accused's good faith—and was properly excluded as infringing the province of the fact-finder. Cf. *United States* v. *Press*, 336 F. 2d 1003, 1013 (C.A. 2), certiorari denied, 379 U.S. 965; *United States* v. *Levy*, 138 F. 2d 429, 432–433 (C.A. 7), certi-

orari denied, 321 U.S. 770; *Shreve* v. *United States*, 103 F. 2d 796, 812 (C.A. 9), certiorari denied, 308 U.S. 570.[11]

3. There is no substance to petitioner's contention that the mail fraud statute, as here applied, violated his right of free speech (Pet. 45–47). The contention rests in part on a claim that the allegation of fraud was based on statements taken out of context. However, while the indictment quoted only portions of the advertising brochure, the fact-finder was not thereby invited, as the opinion below points out (Pet. App. B. 12), to consider the statements divorced from their context. Nor did the government rely at the trial on isolated statements in the advertising materials. The government's Exhibit 37 series consisted of six different printings of the brochure, and a copy of each printing was in evidence. The whole document was thus subject to examination by the fact-finder.

Apart from the contention that the fact-finder was asked to consider the quoted statements out of context, the basis of the present claim is that, if the advertising materials be viewed as a whole, no person of "average intelligence" would have been misled. As a factual matter, this contention has been resolved against petitioner by the courts below. Moreover, even if petitioner were correct that, at most, only the "most gullible" persons and those of "substandard intelli-

[11] Since it was immaterial whether the lots were worth what the purchasers had paid for them (p. 10, *supra*), it was not error to exclude the opinion testimony of the witness Smith as to the value of unimproved land in the area (Pet. 32). *A fortiori*, the offer of proof as to the value of land near Kingman, 60 miles away, was properly rejected (Pet. 32).

gence" could have been deceived by his materials (Pet. 46–47), the point would be irrelevant. The mail fraud statute protects "the gullible, the ignorant and the over-credulous as well as the more skeptical". *United States* v. *Sylvanus*, 192 F. 2d 96, 105 (C.A. 7), certiorari denied, 342 U.S. 943; *Lemon* v. *United States*, 278 F. 2d 369, 373 (C.A. 9); *Norman* v. *United States*, 100 F. 2d 905, 907 (C.A. 6), certiorari denied, 306 U.S. 660.[12]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1968.

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[12] Contrary to petitioner's only remaining contention (Pet. 47–48), the mail fraud statute's proscription of use of the mails in execution of "any scheme or artifice to defraud" is sufficiently plain of meaning to provide an ascertainable standard of guilt. *United States* v. *Attaway*, 211 F. Supp. 682, 685 (W.D. La.); *United States* v. *Gartman*, 145 F. Supp. 420, 421 (E.D. Pa.). See *Durland* v. *United States*, 161 U.S. 306, 312–314. Cf. *Jordan* v. *De George*, 341 U.S. 223, 227–232.

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